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IN THE

Supreme Court of the United States

October Term, 1965
No. 583

CALIFORNIA DEMOCRATIC COUNCIL, *et al.*,

Appellants,

vs.

ROGER ARNEBERGH, *et al.*,

Appellees.

On Appeal From the District Court of Appeal of the State of California, Second Appellate District, Division One.

MOTION TO AFFIRM OR DISMISS.

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On Appeal From the District Court of Appeal of the State of California, Second Appellate District, Division One.

MOTION TO AFFIRM OR DISMISS.

Appellees, pursuant to Rule 16 of the revised Rules of the Supreme Court of the United States, move that the judgment of the District Court of Appeal of the State of California, Second Appellate District, be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to warrant further argument. In the alternative, appellees move that the within appeal from the decision of the District Court of Appeal be dismissed on the same ground.

Opening Statement.

The judgment of the District Court of Appeal of the State of California, Second Appellate District, 233 A.C.A. 508, 43 Cal. Rptr. 531 (1965); upholds the validity of section 8600, the third and fourth paragraphs of section 8601, and section 8603 through 8606 of the California Elections Code. Appellants contend that these sections violate the provisions of the First and Fourteenth Amendments of the Constitution of the United States because said sections allegedly impair freedom of speech, are vague and indefinite, discriminatory, and insofar as they apply to broadcasting, in conflict with federal statutes.

The challenged provisions require that every advertisement having reference to any candidate for nomination for partisan office in the direct primary election, which contains a statement to the effect that the candidate has been endorsed by an organization using as a part of its name the name of a political party or derivative thereof, shall bear a notice that the organization is an unofficial party group and that official organizations of political parties are prohibited by law from endorsing candidates in primary elections.[1]

A related provision of the Elections Code, section 8602, was not challenged below and is not challenged

[1]If the advertisement is intended for broadcast or telecast by radio or television, the notice shall be read in full instead of printed. Cal. Elec. Code § 8605.

by the appellants in this Court. Section 8602 designates the State Convention, State Central Committee, and the County Central Committee in each county as the official governing bodies of a party qualified to participate in the direct primary election; prohibits official governing bodies from making pre-primary endorsements; and further prohibits all persons from claiming that a candidate is the official candidate or the officially endorsed candidate of a party.

Although appellants' contentions present, in the abstract, a number of federal questions, the decision of the State court on these questions was so clearly correct that their further consideration by this Court is not necessary.

ARGUMENT.

I.

The Challenged Provisions of the Elections Code Do Not Violate the Rights of Free Speech, Free Press, or Free Assembly.

A. The Provisions of the Elections Code Constitute Reasonable Regulations to Prevent Misunderstanding by the Voters.

The essence of a direct primary election in California is that the selection of a party's candidates is withdrawn from party conventions and caucuses, and that the unfettered choice of each party's candidates is placed in the hands of the voters at the primary election. *Heney v. Jordan,* 179 Cal. 24, 31, 175 Pac. 402, 405 (1918); *Hart v. Jordan,* 168 Cal. 321, 323, 143 Pac. 537, 538 (1914).

Such a choice cannot be made intelligently where there is doubt and confusion as to whether pre-primary endorsements are those of a private group of citizens, or an official governing body of a political party, or otherwise.

The California Legislature has expressly found that considerable doubt and confusion on this subject has existed in the minds of the voting public. In section 8601 of the Elections Code, the Legislature found:

> "(3) Over the several years preceding the adoption of this section organizations of electors using as a part of their names the name of a political party qualified to participate in the direct primary election have endorsed candidates for nomination of that party for partisan office in the direct primary election and have publicized and promul-

gated such endorsements in a manner which has resulted in considerable public doubt and confusion as to whether such endorsements are those of a private group of citizens or of an official governing body of a political party."

And in section 8601, the Legislature further found:

"(4) The voting public is entitled to protection by law from deception in political campaigns in the same manner and for the same reasons that it is entitled to protection from deception by advertisers of commercial products."

The matter is one peculiarly within the knowledge of the members of the Legislature since each of them participated and campaigned in a primary election in order to obtain his seat in the Legislature. Moreover, it must be presumed that "the governor and the legislature have performed their duty, and ascertained the existence of the fact before enacting or approving the law . . ." *Smith v. Mathews,* 155 Cal. 752, 756 (1909).

Certainly, it cannot reasonably be said that these legislative findings are arbitrary. The name, "California Democratic Council" would imply to most voters, including many attorneys whose practice does not include election matters, that the California Democratic Council is an official organization of the Democratic Party in California, and that the candidates endorsed by it are endorsed by the Democratic Party itself.

It would be, to paraphrase the words of Mr. Justice Frankfurter in *Beauharnais v. Illinois,* 343 U.S. 250, 263 (1952), "arrant dogmatism, quite outside the scope of [this Court's] authority in passing on the powers of a State," for this Court to deny that the California

Legislature might warrantably believe that a statement to the effect that "X" is endorsed by an organization whose name contains the word "Democrat" would tend to mislead or confuse the voters as to whether the endorsement is that of a private group of citizens or that of an official governing body of the Democratic Party. It would similarly be outside the scope of this Court's authority to deny that the California Legislature might warrantably believe that this is a problem which deserved legislative action pursuant to the powers conferred upon the Legislature to regulate and control primary elections and the terms and conditions under which electors and organizations may participate therein (Cal. Const., art. II, § 2.5).

The challenged provisions of the Elections Code merely prohibit deceiving the public. The right of free speech (even in non-commercial matters) does not include the right to deceive (*United States v. Rutherford* [*C.C.A.* N.Y. 1964], 332 F.2d 444, 446, cert. denied 377 U.S. 994), or the right to make knowingly false statements (*Garrison v. Louisiana*, 379 U.S. 64, 75 [1964]).

The quotation from *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964), at page 16 of appellants' Jurisdictional Statement—"That erroneous statement is inevitable in free debate . . ."—can have no application here. Appellant, California Democratic Council, concedes that it is not an official party organ. Any implication that its endorsement is an official endorsement of the Democratic Party is, therefore, known in advance to be, and is admitted to be false.

The challenged provisions of the Elections Code are not concerned with the contents of a publication. They do not prevent any of the appellants from making pre-

primary endorsements. Said sections merely prohibit doing so in a way which implies that the endorsement is by an official party organ.

These sections of the Elections Code, unlike the city ordinance involved in *Talley v. California,* 362 U.S. 60 (1960), do not prohibit anonymity. They only prohibit the false implication of who the sponsor is. A person may have a right to refuse to identify himself (although not under all circumstances[2]), but can it seriously be claimed that he has a right to give a misleading identification?

B. Elections Code Sections 8603-8606 Do Prevent the Evil Which the Legislature Seeks to Curb.

Appellants assume that the only evil requiring a remedy is that of intentionally and falsely stating that a group is an official party organ (Juris. St., p. 21). This matter is already covered in part by the last sentence of section 8602 of the Elections Code:

> ". . . No candidate for such nomination shall claim, *nor shall any other person claim on his behalf,* that he is the official candidate or the officially endorsed candidate of that party." (Emphasis added.)

The word "person" as used in California laws, includes artificial as well as natural persons. *Douglass v. Pac. M.S.S. Co.,* 4 Cal. 304, 306 (1854); *Western U. Tel. Co. v. Superior Court,* 15 Cal. App. 679, 695 (1911).

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[2]*Lewis Publishing Co. v. Morgan,* 229 U.S. 288 (1913); *United States v. Harriss,* 347 U.S. 617, 625 (1954); *United States v. Scott,* 195 F. Supp. 440, 443 (N.D. 1961); *Canon v. Justice Court,* 61 Cal. 2d 446, 453; 39 Cal. Rptr. 228, 231; 393 P.2d 428, 431 (1964).

Voters, however, are entitled to protection from more than just intentional fraud. The purpose of the legislation is not to punish the speaker or publisher, but rather to protect the voters from being misled into believing that any candidate is the official candidate of a political party. Neither the literal truth of the statement, nor the innocent intent in making it will protect those members of the public who, quite naturally, but mistakenly, assume that since appellant's name includes the word "Democratic" it is an official organization of the Democratic Party, and its endorsement is the official endorsement of the Democratic Party.

This Court has acted before to uphold prohibitions against the use of a misleading name, even though the name was innocently adopted. See *American Airlines v. North American Airlines,* 351 U.S. 79, 86 (1956).

The appellants know the California Democratic Council is not an official party organ. The situation here is not like that in *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), or *Garrison v. Louisiana,* 379 U.S. 64 (1964), where false statements were made, but they were not known to be false.

Not only do appellants know that the California Democratic Council is not an official party organization (as they themselves emphasize at pages 12 and 13), but they have been informed by the Legislature that the use of that name in connection with pre-primary endorsements, without explanation, misleads voters. Yet, they do not wish to give the notice prescribed by the

statute. This is the very type of conduct condemned in *Fed. Trade Comm'n v. Algoma*, 291 U.S. 67, 81 (1934):

> ". . . Indeed there is a kind of fraud, as courts of equity have long perceived, in clinging to a benefit which is the product of misrepresentation, however innocently made. . . ."

Appellants say:

> ". . . No attempt is made to masquerade as the official party organization. As a matter of fact, great pride is taken in the status of the California Democratic Council as a group of volunteers, unpaid party members not acting in any official capacity." (Juris. St. pp. 12-13.)

Why then do appellants object so vigorously to stating the fact in which they take such great pride?

C. The Notice Provisions of Sections 8603-8606 Do Not Inhibit Free Expression of Free Association. Any Burden Imposed by the Statute Is Outweighed by the Benefit to the Public.

Sections 8603-8606, it is respectfully submitted, do not tend to inhibit or restrict freedom of speech, freedom of the press, or freedom of association. They do not govern, dictate or control what appellants may include in their campaign literature. They only require that a statement be made to counteract the implication that appellant California Democratic Council's endorsement is that of an official governing body, an implication which the Legislature has reasonably determined arises from the fact that said appellant's name includes the word "Democratic." The required statement is truth-

ful and the implication which it is intended to negate is false.

Even assuming, *arguendo,* that the notice requirements might have a tendency to inhibit the making of endorsements, such an effect would be minimal. In any event, any economic burden or inhibiting effect on free expression or on free association is far outweighed by the benefit accruing to the voting public from the challenged provisions of the statute. The constitutionality of a statute infringing freedom of speech depends on a balancing of the deterrent effect on the enjoyment of individual liberties, if any, with the importance of the governmental interest giving rise to the statute in question. *Communist Party v. Control Board,* 367 U.S. 1, 91 (1961); *Garrison v. Louisiana,* 379 U.S. 64, 75 (1964); *Chaplinsky v. New Hampshire,* 315 U.S. 568, 572 (1942).

II.

The Challenged Statute Does Not Place an Unconstitutional Burden on Appellants or Other Persons Seeking to Publicize Pre-Primary Endorsements.

A. The State Legislature May Authorize the Use of an Injunction.

At page 25 of their Jurisdictional Statement, appellants say:

> "This legislation also inhibits free expression through civil judgment in injunctive proceedings. . . . The injunction may be sought at that crucial moment after a large amount of money has been paid and the printing is published and ready to be distributed or just before the billboards are posted. Then the injunctive proceeding is initiated. . . ."

Appellants however, are protected by the rule that:

> ". . . The application [for a temporary injunction] should also be made promptly, and not delayed until large expenditures have been made by the defendants. . . ."
>
> *Real Del Monte Mining Co. v. Pond Mining Co.*, 23 Cal. 82, 84 (1863);

also see:

> *Schwartz v. Arata*, 45 Cal. App. 596, 606, 188 Pac. 313, 317 (1920).

Appellants also are protected by the rule that the granting of a restraining order is within the sound discretion of the Court and must be exercised in favor of the party most likely to be injured. *Real Del Monte Mining Co. v. Pond Mining Co., supra; McCoy v. Matich*, 128 Cal. App. 2d 50, 52, 274 Pac. 714 (1954); *Riviello v. Journeymen Barbers etc. Union*, 88 Cal. App. 2d 499, 510, 199 P.2d 400 (1948). It must be assumed that a temporary injunction will not be granted unless the threat of violation appears almost certain otherwise.

Since the prohibitions in sections 8603, 8604 and 8605 are valid, the manner in which these prohibitions are to be enforced—whether by criminal prosecution or by injunction or by both—is a matter within the discretion of the Legislature. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 440-41 (1957).

If, a few days before the primary election, literature is circulated which states that the California Democratic Council endorses Richard Roe, without an explanation that the Council is an unofficial party organization, many voters may cast their ballots for Richard Roe solely because they believe he is the candidate officially

endorsed by the Democratic Party. Obviously, such a misconception must be prevented prior to the primary election in order to serve the objectives of the statute. After the primary election, neither an injunction nor any other remedy can right the wrong done to the public.

B. The Legislature Has Not Attempted to Create a Presumption of Guilt.

At page 29 of their Jurisdictional Statement, appellants say:

> "Moreover, the legislature may not declare by some type of finding that a person is guilty and thrust upon that person the burden of proving his innocence. . . ."

Appellants seem to contend that the Elections Code prohibits an organization such as appellant, California Democratic Council, from representing that it is an official party organ, and then provides that the use of a name containing the name of a political party results in a presumption that the organization is so representing itself. This is not true.

The statute requires that a statement to the effect that an organization such as appellant, California Democratic Council, endorses or supports a candidate, must bear the prescribed notice. The statute prohibits making or allowing a payment for printing, publishing or distributing such a statement without the prescribed notice. No presumption of guilt is involved. The statute creates no presumption that any person or organization has printed, published or distributed such a statement of endorsement without giving the required notice; nor

does the statute create a presumption that any one has made or accepted a payment in consideration of such act or acts.

Appellants confuse the legislative finding of necessity with a legislative presumption of guilt. Every prohibitory statute or ordinance is based upon a finding or determination by the legislative body that the activity prohibited is detrimental to the public. No presumption of guilt results therefrom. This is especially true in the instant case where the activity prohibited is with respect to communications which have a natural tendency to mislead the public, even though the communication may be true and may be made with no intent to deceive.

III.

The Challenged Provisions of the Statute Do Not Violate Constitutional Guarantees of Equality Before the Law.

Appellants claim that the notice provisions of sections 8603-8606 are discriminatory because they apply to endorsements by appellant, California Democratic Council, but do not apply to endorsements by organizations which do not have the name of a political party as a part of their names, and do not apply to individuals who make endorsements (Juris. St. pp. 29-31). This Court has on many occasions said:

> ". . . the equal-protection clause does not preclude the states from resorting to classification for the purposes of legislation. It only requires that the classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly cir-

cumstanced shall be treated alike.' Colgate v. Harvey, 296 U.S. 404, 422, 423, and cases cited."

Old Dearborn Co. v. Seagram, 299 U.S. 183, 197 (1936).

And this Court has also said:

". . . It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed. . . . It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety."

Rast v. Van Deman & Lewis Co., 240 U.S. 342, 357 (1916).

Also see:

Allied Stores of Ohio v. Bowers, 358 U.S. 522, 528 (1959); and

Rapid Transit Corp. v. New York, 303 U.S. 573, 578 (1938).

In the instant case we need not search for "any state of facts [which] reasonably can be conceived that would sustain" the challenged portions of the statute. The Legislature has expressly stated what those facts are and found them to be true in section 8601(3) of the Elections Code.

The purpose of chapter 4 of division 6 of the Elections Code is to prevent deception of the public not only by: (a) express statements that an endorsement constitutes the official endorsement of a party; but also by (b) implied statements to that effect.

The prevention of deception by express statements is accomplished by the provisions of section 8602 which provide, in part, as follows:

> ". . . No candidate for such nomination shall claim, nor shall any other person claim on his behalf, that he is the official candidate or the officially endorsed candidate of that party."

This prohibition in section 8602 applies, of course, to all individuals, and to organizations which include within their name the name of a political party or derivative thereof, as well as to organizations which do not include within their name such a name or derivative thereof.

The prevention of deception by implication is accomplished by the notice in endorsement provisions of sections 8603-8606. While these provisions do not apply to organizations which do not use the name of a political party or derivative thereof, there is a natural, intrinsic and reasonable distinction between the two that has a substantial relationship to the purpose for which the legislation was designed. An endorsement by the Richard Roe Club, for example, would not tend to imply that either the endorsement or the club was official (unless it was expressly so stated, in which event there would be a violation of section 8602).

A better example of a valid classification would be difficult to find. The requirement that a misleading impression be corrected applies only to those organizations whose names mislead. It applies to all such organizations. There is here not only a reasonable correlation between the class and the evil to be corrected, which is all that is necessary, but an *exact* correlation.

IV.

Elections Code Sections 8603-8605 Are Neither Vague nor Indefinite.

Contrary to the assertions on pages 31-34 of appellants' Jurisdictional Statement, the provisions of sections 8603-8605 are neither vague nor indefinite.

The guiding principles are succinctly summarized in *Roth v. United States,* 354 U.S. 476, 491 (1957), as follows:

> ". . . This Court . . . has consistently held that lack of precision is not itself offensive to the requirements of due process. '. . . [T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . .' United States v. Petrillo, 332 U.S. 1, 7-8. . . . '. . . That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. . . .' Id. 332 U.S. at 7."

In a similar vein, this Court said in *Hygrade Provision Co. v. Sherman,* 266 U.S. 497, 502 (1925):

> ". . . If exceptional cases may sometimes arise where opinions might differ, that is no more than is likely to occur, and does occur, in respect of many criminal statutes either upheld against attack or never assailed as indefinite. . . ."[3]

[3]Also see *Kovacs v. Cooper,* 336 U.S. 77, 80 (1949); *Armenta v. Churchill* 42 Cal. 2d 448, 454, 267 P.2d 303, 307 (1954);

Measured by these principles, appellants' claim of unconstitutional vagueness must fail. Furthermore, since the endorsement of appellant, California Democratic Council, clearly falls within the provisions of sections 8603-8606, this Court need not consider various hypothetical situations posed by appellants which do not, and could not concern them. *Gorieb v. Fox,* 274 U.S. 603, 606 (1927); *United States v. Wurzbach,* 280 U.S. 396 (1930).

Although, as appellants point out (Juris. St., p. 31), the California Supreme Court has said that "a court in considering the claim of overbreadth and vagueness may take into account the operation of the provision as to factual situations other than the one at bar . . ." (*Fort v. Civil Service Commission,* 61 Cal. 2d 331, 339, 38 Cal. Rptr. 625, 630, 392 P.2d 385, 390 (1964)), neither the California Supreme Court nor any other court has said that situations would be considered which *never could* apply to the plaintiff.

This Court does not give advisory opinions. *Zemel v. Rusk,* 381 U.S. 1, 20 (1965); *Federation of Labor v. McAdory,* 325 U.S. 450, 462 (1945). It considers only those questions which directly concern an appellant. An appellant must have standing to sue. *Chamberlin v. Dade County Board of Public Instruction,*

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and *Smulson v. Board of Dental Examiners,* 47 Cal. App. 2d 584, 587, 118 P.2d 483, 484 (1941): ". . . It is not required that even a penal statute, to be valid, have that degree of exactness which inheres in a mathematical theorem."

377 U.S. 402 (1964); *Doremus v. Board of Education*, 342 U.S. 429 (1952).

As Mr. Justice Holmes said in the case of *United States v. Wurzbach*, 280 U.S. 396 at 399 (1930), which upheld a federal statute prohibiting any representative in Congress from soliciting campaign contributions from federal office holders:

> ". . . The objection to uncertainty concerning the persons embraced need not trouble us now. There is no doubt that the words include representatives, and if there is any difficulty, which we are far from intimating, it will be time enough to consider it when raised by someone whom it concerns."

V.

Elections Code Section 8605 Does Not Invade a Field Preempted by Congress.

At pages 34 and 35 of their Jurisdictional Statement, appellants contend that Congress has occupied the field, relying upon 47 U.S.C. §§ 315 and 326, and *Allen B. Dumont Laboratories, v. Carroll*, 184 F.2d 153 (3d Cir. 1950), cert. denied 340 U.S. 929.

But section 315 of Title 47 of the United States Code is, on its face, inapposite. It requires equal time for candidates and prohibits a licensee from exercising any power of censorship over the material broadcast under the provisions of this section. Furthermore, this section,

". . . applies only to the use of a broadcasting station by a candidate personally and . . . it does not apply to the use of such a station by other persons speaking in the interest or support of a candidate."

Felix v. Westinghouse Radio Stations, 186 F.2d 1, 3 (3d Cir. 1950; cert. denied 341 U.S. 909).

Section 326 of Title 47 of the United States Code provides that the Federal Communications Commission has no power of censorship over radio communications, and no power to promulgate regulations interfering with the right of free speech by radio communication.

In *Allen B. Dumont Laboratories v. Carroll, supra,* the United States Court of Appeals ruled that the State of Pennsylvania could not censor television programs for obscenity. Although there is broad language in *Dumont* to the effect that Congress has occupied fully the field of television regulation, and that said field is no longer open to the states, a careful reading of the opinion indicates that the actual holding of the case was narrow. The Court of Appeals held only that the Pennsylvania obscenity control statute was preempted by those provisions of the Federal Communications Act expressly dealing with communications containing profane or obscene words, language, or meaning. 47 U.S.C. § 303(m)(1)(D). On the other hand, there are no provisions of the Federal Communications Act dealing with pre-primary endorsements—the area covered by sections 8603-8606 of the Elections Code.

In *Head v. New Mexico Board*, 374 U.S. 424, 431-32 (1963), the Supreme Court of the United States noted that this was the narrow holding in *Dumont*.[4] In *Head*, this Court upheld a judgment of a state court of New Mexico which enjoined a radio station from broadcasting advertising material found to be in violation of the laws of the State of New Mexico.

Appellants attempt to distinguish the *Head* case on the ground that it involved commercial advertising, whereas political advertising is involved here (Juris. St. p. 35). This is not a valid ground of distinction. Whether Congress has occupied the field is purely a question of statutory construction.

Appellants also rely on *Farmers Union v. WDAY*, 360 U.S. 525, 535 (1959). But *WDAY* is readily distinguishable since it involved an obvious and clear conflict between state law and section 315 of Title 47. In the *WDAY* case, this Court held that a radio station could not be sued for libel by a candidate, where section 315 of Title 47 of the United States Code compelled the station to permit him to broadcast and also prohibited consoring of what he said. Obviously, a state law permitting the recovery of damages for allowing a broadcast which federal law compelled the sta-

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4 ". . . Compare Allen B. Dumont Laboratories v. Carroll, 184 F. 2d 153, which held state censorship of motion pictures shown on television preempted by those provisions of the federal act expressly dealing with 'communications containing profane or obscene words, language, or meaning.' 47 U.S.C. § 303(m)(1)(D)." 374 U.S. at 431 (footnote 10).

tion to allow would be in conflict with that federal law. There is no such conflict here. Therefore, sections 8603-8606 cannot be condemned as in conflict with national legislation. *Federation of Labor v. McAdory,* 325 U.S. 450, 467 (1945).

The legislation attacked by appellants here is most peculiarly a matter of state concern. The method of nominating candidates to run for public office is exclusively controlled by the states, and the methods vary greatly from state to state. It would be impossible to draft federal legislation or regulations of the Federal Communications Commission to accomplish, in all the fifty states of the Union, the purpose of the state legislation now under consideration. Appellants have not cited, nor have we found any federal law or regulation even remotely in conflict with the Elections Code provisions now under consideration. The provisions of the Elections Code are in no way an obstacle to the full effectiveness of the federal statute upon which appellants rely.

Conclusion.

The challenged provisions of the statute are reasonable. They require that an organization using the name of a political party shall, by proper notice, eliminate a false impression that the use of such name in connection with pre-primary endorsements conveys to the public. The burden to the organization is slight and is far outweighed by the resulting benefit to the public. The stat-

ute is constitutional and no *substantial* federal question is presented. Appellees' motion to affirm or dismiss should be granted.

Respectfully submitted,

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